MOTION FILED
OCT 1 - 1982

No. 82-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,

v.

BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

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MOTION BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO (IAFF) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The Petitioner has consented to the filing of this brief, while Respondent has withheld consent.[1]

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[1] Copies of the relevant letters have been filed with the Clerk of this Court.

INTEREST OF THE IAFF AND THE ISSUES TO BE COVERED IN THE IAFF'S BRIEF AMICUS CURIAE

The International Association of Fire Fighters, AFL-CIO (IAFF) is an unincorporated association comprised of federal, state, and municipal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the U.S. The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF wishes to represent the interests of its members across the country who are facing, or may face, the prospects of layoffs caused by fiscal exigencies such as those which were carried out by the City of Boston, and who are employed pursuant to seniority systems established by state and/or local law. The prospects of reductions-in-force in these jurisdictions are not merely conjectural.

In a report issued by the Bureau of National Affairs, figures released showed that layoffs of state workers occurred in fiscal year 1981 in 43 of the 50 states, while in fiscal year 1982, 44 states either experienced layoffs or anticipated them by the end of the year. "Layoffs, Rifs, and EEO in the Public Sector, A BNA Special Report," *Government Employee Relations Report*, GERR No. 949, February 8, 1982, pp. 13-15. The financial situation among local governments indicates a similarly stark outlook. In a survey of 100 cities, 62 have laid off or were expecting to layoff employees in fiscal year 1982. Many of these jurisdictions are covered by civil service laws which contain seniority-based layoff provisions that determine the order in which employees will be furloughed in work force reductions.[2] Like Boston, many cities have

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[2] *See* Pet. for Cert. of Boston Firefighters Union, Local 718, pp. A47-A48.

also entered into consent decrees to settle employment discrimination lawsuits. *Government Employee Relations Report, supra,* at 23-36. There is no indication that the financial problems of state and local governments will significantly improve in the near future, and the prospects for continued reductions-in-force remain substantial.

The attached brief *amicus curiae* is submitted to bring to this Court's attention the conflict between the decisions of the courts below which suspended the operation of a valid civil service statute which provides for layoffs based on seniority, and prior decisions of this Court which have held that bona fide seniority systems are afforded special protection in employment discrimination suits.

CONCLUSION

The IAFF has a major interest in the Petition for a Writ of Certiorari previously filed by Petitioner, Boston Firefighters Union, Local 718, and therefore requests, for the above stated reasons, that this motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION FOR THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

In affirming the District Court's modification of a consent decree previously entered into by the City of Boston

and minority employees in settlement of an employment discrimination suit, the Court of Appeals for the First Circuit directed the layoff of employees contrary to the provisions of a bona fide seniority system enacted by the Massachusetts legislature. The decision of the First Circuit failed to apply the principles established by this Court that absent a discriminatory purpose, the routine application of a seniority system is not invalid, even though it may result in certain discriminatory consequences. Further, the lower courts' decisions award superseniority to minority employees even though those employees are not identified victims of racially discriminatory employment practices. Because the decisions of the courts below fail to properly consider these and other principles involving the statutory protection afforded bona fide seniority systems or employment practices, the petition for writ of certiorari should be granted.

ARGUMENT

The Petition Should Be Granted Because The Decision Below Disregards Principles Established By This Court Concerning The Special Protection That Is Afforded Bona Fide Seniority Systems In Employment Discrimination Suits.

In a broad pronouncement, the First Circuit held that a District Court has the equitable power to modify a consent decree in a manner that suspends the operation of a bona fide seniority system established by state law. *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). The City of Boston was faced with an economic crisis resulting from the effects of a tax reduction referendum ("Proposition 2½") recently approved by the voters of Massachusetts. It commenced a program to reduce its fire fighting force via layoffs in accordance with the routine application of the "last-hired, first-furloughed" provisions of existing Massachusetts law. Mass. Gen. Laws, Ch. 31, § 39. This action would have caused

minority employees hired as a result of the remedial measures contained in a prior consent decree temporarily to lose their jobs. The District Court concluded that the application of this statute in effectuating layoffs would reverse the results of the prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in obtaining employment in the fire department, and would produce a "grievous wrong." *Castro v. Beecher*, 522 F.Supp. 873, 877 (D. Mass. 1981). It therefore modified the decree to enjoin the fire department from reducing the percentage of blacks and hispanics below the level that existed immediately prior to the commencement of the reduction-in-force program. For the purpose of implementing its order, the District Court required that separate seniority lists be established for minority and non-minority personnel, and ordered that these lists be used in conducting layoffs so that the percentage of minority fire fighters at no time fell below 14.7 percent. The First Circuit approved this remedial measure. This decision flies in the face of the protection Congress afforded bona fide seniority systems under Section 703(h) of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2(h).

The decisions of this Court have repeatedly emphasized the "overriding importance" of seniority systems. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964); *American Tobacco Co. v. Patterson*, 456 U.S. ——, 71 L. Ed. 2d 748, 760 (1982). The Court has recognized that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) . . . [and that] seniority affects the economic security of the individual employee. . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976).

In enacting the Civil Rights Act of 1964, Congress was fully aware of the importance and extent of seniority systems in collective bargaining agreements and afforded bona fide systems "special treatment under Title VII itself." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). As this Court explained in *International Brotherhood of Teamsters v. United States*, 421 U.S. 324, 352 (1977), "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." These principles remained viable when Congress amended the Civil Rights Act in 1972 to apply to public employers, and they are applicable to *all* bona fide seniority systems, whether such systems are the product of state law or agreements resulting from collective bargaining.

The court below, however, concluded that the prior decisions of this court which held that seniority systems are afforded special protection (i.e, *Franks, Teamsters, American Tobacco Co. v. Patterson*, 456 U.S. ——, 71 L.Ed.2d 748 (1982)) did not preclude the district court from enjoining layoffs conducted in strict accordance with the seniority policy embodied in the statute. The First Circuit artfully avoided these decisions of this Court by characterizing the issue as "the power of a Court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Beecher, supra*, 679 F.2d at 974-975. However, these decisions cannot properly be ignored in these factual circumstances. The holding of the First Circuit both oversimplifies the issue and misinterprets the prior authority of this Court.

When the original consent decree was approved in 1974, the District Court found the City's discriminatory employment practices to be an entrance examination which had a disproportionate impact on minority hiring and which was not job-related, and a word-of-mouth recruitment policy that resulted in unintentional racial discrimination. To remedy this discrimination, the Court ordered the de-

velopment of a job-related examination, active recruitment of minority applicants, and the establishment of priority certification groups for black and hispanic applicants. *Boston Chapter, NAACP v. Beecher*, 371 F.Supp. 507, 520-523 (D. Mass. 1974). At the time the District Court modified the decree to prohibit layoffs in accordance with seniority, it made no determination that the fire department had failed to take the necessary steps to comply with the decree. Nor has such a finding been made on appeal.[1] Thus, the lower courts' injunction against the City's legitimate response to its unanticipated fiscal emergency far exceeds the true remedial purposes of the original consent decree. The alleged wrong to be remedied by the original decree was the fire department's *recruitment* and *hiring* policies, not its seniority system. Nevertheless, it is its seniority system which has been trammelled.

The scope of a district court's remedial powers under Title VII of the Civil Rights Act of 1964 is determined by the purposes of that Act. This Court has noted that "a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 364. Those barriers have been removed through the City's continued compliance with the consent decree, and thus, the primary objective of Title VII has been attained.

Nevertheless, the Court of Appeals' affirmance of the District Court's order approved what is, in effect, a grant of retroactive or superseniority to minority firemen in

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[1] In fact, the Courts of Appeals expressly noted that during the six-year period preceding the commencement of the layoffs, the fire department had been steadily increasing the percentage of minority employees pursuant to the consent decrees previously entered in this case. *Boston Chapter, NAACP v. Beecher*, *supra*, 679 F.2d at 966, 970.

contravention of the procedures contained in the bona fide seniority system. It no longer can be disputed that an award of retroactive seniority to identified victims of discriminatory employment practices is proper. *Franks v. Bowman Transportation Co., supra.* But here there has been no adjudication that the City has committed any violation of Title VII in determining that a reduction in personnel was necessary or in effectuating the reduction by complying with the seniority provisions of the state staute. There are no identified victims of discriminatory practices to be accorded such seniority relief under *Franks;* the Court of Appeals has so acknowledged.[2]

More importantly, it is well-settled at this point that Section 703(h) immunizes bona fide seniority systems from attack. Absent a discriminatory purpose, the operation of a seniority system that has some discriminatory consequences is not unlawful. *Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 82.

The courts below were concerned over the fact that the layoffs, if conducted in accordance with the procedures contained in the seniority system, would fall most heavily on the minority employees. The layoffs would indeed affect minority employees in greater proportions, but this disproportionate impact is due solely to the fact that most minority firemen were only recently hired. Such a disproportionate impact alone is not enough under § 703(h) to invalidate a seniority system. *Pullman Standard v. Swint,* —— U.S. ——, 102 S. Ct. 1781 (1982).

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[2] The Court of Appeals admitted that it did not consider whether those minority fire fighters who were granted relief from being laid off were identified victims of discrimination. "This case does not involve an award of constructive seniority to individuals who have been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination." *Boston Chapter, NAACP v. Beecher, supra,* 679 F.2d at 975.

The Court of Appeals viewed the case as one involving "two competing rights, earned seniority versus racially balanced police and fire departments," 679 F.2d at 977, and held that the seniority system must yield in these circumstances. This statement impliedly attributes a purpose to Title VII that Congress did not intend. The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Teamsters, supra*, 431 U.S. at 348 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). The Congressional intent was to ensure that the same employment *opportunities* be made available to all, and not, as the First Circuit held, to ensure that an employer's work force be racially balanced at all times according to the racial make-up of the local population. Further, while the advantages of the seniority system may flow disproportionately to non-minority fire fighters due to the fact that prior discriminatory practices prevented a significant number of minorities from being hired earlier, it is clear that Congress "considered this very effect of many seniority systems and extended a measure of immunity to them." *Id.* at 350. The Courts below have ignored this balance struck by Congress by suspending the operation of the City's neutral, legitimate seniority system.[3]

The importance of resolving the direct conflict between the decision of the Court of Appeals and prior decisions

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[3] The fact that Plaintiffs brought suit pursuant to 42 U.S.C. § 1981 as well as Title VII does not serve as an alternative basis upon which to suspend the operation of a bona fide seniority system. Before a remedy may be imposed under the rubric of that statute, it also must be shown that any differential treatment was the result of purposeful discrimination. *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L. Ed. 2d 835 (1982). No such showing was made below. *Boston Chapter, NAACP v. Beecher, supra*, 679 F.2d at 969.

of this Court regarding the statutory protection afforded bona fide seniority systems cannot be overstated in these times of fiscal emergencies and resultant economic layoffs. The effects on all employees working under statutes and agreements creating seniority systems is obvious.

CONCLUSION

For the foregoing reasons, the Amicus requests that a writ of certiorari be granted to review the decision of the Court of Appeals for the First Circuit.

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